IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. _____

PAUL WEISS,

Petitioner,

- against -

Reverend MICHAEL WALSH, S.J., in his capacity as President of Fordham University; PAUL J. REISS, in his capacity as Vice-President of Academic Affairs of Fordham University; ROBERT ROTH, S.J., in his capacity as Chairman of the Department of Philosophy of Fordham University; EWALD B. NYQUIST, in his capacity as Commissioner of Education of the State of New York; JOSEPH W. McGOVERN, EVERETT J. PENNY, KENNETH B. CLARK, CARL H. PFORZHEIMER, JR., CHARLES W. MILLARD, JR., JOSEPH C. INDELICATO, EDWARD M. WARBURG, MRS. HELEN B. POWER, JOSEPH T. KING, ALEXANDER J. ALLEN, JR., FRANCIS W. McGINLEY, MAX J. RUBIN, THEODORE M. BLACK, STEPHEN K. BAILEY and HAROLD E. NEWCOMB, in their capacities as Regents of the University of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner, Paul Weiss,

respectfully prays that a writ of certiorari

issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 29, 1972.

OPINION BELOW

There was no opinion of the Court of Appeals, but an affirmance from the Bench. The relevant opinions of the District Court for the Southern District of New York are reported in the Appendix and one was reported in 324 F. Supp. 75 (S.D.N.Y. 1971).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on June 29, 1972, and the Petition for Rehearing en banc was denied on August 29, 1972. This petition for certiorari was issued within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Was the Second Circuit Court of Appeals correct in affirming a dismissal of a Civil Rights action upholding as constitutionally sanctified the practice of exclusion from employment on the sole basis of chronological age?

(2) Was the Second Circuit Court of Appeals correct in finding no denial of due process in a trial where a jury was was denied, prejudice towards client and counsel shown and expert testimony excluded?

(1) Has the Second Circuit Court of Appeals overseen in affirming a dismissal of a Civil Rights action upholding as constitutionally permitted the practice of [illegible] on the sole basis of [illegible]

(2) Has the Second Circuit Court of Appeals [illegible] in finding no denial of due process in a trial where a jury was denied, permitting [illegible] and coerced [illegible] testimony [illegible]

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STATEMENT OF THE CASE

Paul Weiss, Sterling Professor of Philosophy at Yale University achieved 58 years of age on May 19, 1969. As previously agreed with Yale, he retired in June, 1969.

His resulting availability was widely known in philosophical circles. Many universities tried to interest him in teaching at their universities after June, 1968. In particular, Fordham University enlisted its academic Vice-President, other administrative officials, and various members of the Philosophy Department of Fordham to recruit Paul Weiss to come there.

On January 30, 1968, Robert Neville, Vice-Chairman of the Philosophy Department, wrote to Paul Weiss "to offer you the first of Fordham's University Professorships, to be effective in September of 1969" (A113-15).[1/] On February 6, 1968, Vice-President Arthur Brown wrote to

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1/ (A) refer to appendix to this Petition. Many facts, however, will not have (A) numbers but are taken from the total record below.

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clarify that "[the] beginning contract [was] for two years with the option of annual renewal as long as you and I wish to continue our association.

The parties (with Fordham enlisting various academics) continued to negotiate the contract and then on April 23, 1968, Arthur Brown wrote Paul Weiss that because of budgetary problems "[W]e must withdraw the offer of a university professorship and any other offer that would come out of our budget."

"Dr. Neville says he told you of our plan to offer you the Schweitzer Chair if Fordham can regain it. This plan is in no way changed. If the State does reallot a Schweitzer Professorship to us, you are our choice...If the Schweitzer Chair does come through, we shall be at your door again". (A 54).

In an explanatory letter of the same date, Robert Neville, drafter of the Arthur Brown letter, wrote "If the Schweitzer money still comes through, you will get it" (A 56). Following Arthur Brown's direction, Robert Neville discussed the letters and the general negotiations with Paul Weiss by telephone.

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The parties agreed they were waiting for the Schweitzer money together and that Paul Weiss would assume the Chair if and when the money became available from New York State.

While awaiting the Chair, Paul Weiss accepted another offer of a Heffer Chair of Philosophy at Catholic University where he now is with an understanding that he would leave to go to Fordham when the Schweitzer Chair funds became available. In the following months, Paul Weiss repeatedly asked when the money would become available and held up some plans waiting for the money. At parties with Fordham faculty he greeted them and they he as colleagues.

In the meantime, Fordham had a change of administrative personnel. Paul J. Reiss replaced Arthur Brown as Academic Vice-President, and Michael Walsh replaced Leo McLaughlin as President. Then, in the spring of 1970, it became common knowledge in the profession that the money for the Schweitzer Chair would be released to Fordham. On August 13, 1970,

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Paul J. Reiss after speaking to Alvin P. Learheimer of the State Education Department about Paul Weiss wrote him "[M]y predecessor in this office has informed a distinguished professor of Philosophy that he would be nominated by Fordham University for the Schweitzer Chair if and when Fordham was in a position to make such a nomination. This commitment was made over two years ago" (A 58) and inquired whether "the man's age...would not be...acceptable" (A 58). The State replied on August 25th that the matter should 'be governed by the Universities' own personnel policies."

On September 3rd, 1970, Paul Reiss wrote Paul Weiss

> "I have inquired of the State Education Department concerning a nomination for you. I have been informed by them, however, that such a nomination would not be approved since you would be in 1971 already beyond the age at which even a part-time position at the University could be maintained. The Schweitzer Professor is expected to be appointed in accordance with the University's normal faculty policies. In addition, the State Education Department pointed out that the purposes that motivated the

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establishment of the Schweitzer Chair assume that an appointee will hold the Chair for an extended period of years.

I regret that we are, therefore, unable to nominate you for the Chair. If Fordham had received the Chair, as it should have, several years ago, we would have had the benefit of your contributions to the University, its students and faculty. I am sorry that this did not come about."(A 60-61)

Paul Weiss then called Paul Reiss who informed him he was the only candidate and age the only factor of exclusion. Subsequent to the conversation, Paul Reiss again wrote Paul Weiss on September 22, 1970:

That the Schweitzer Professorship has been awarded to Fordham means that the University has been invited to submit a nominee. If, however, the State Education Department is not favorably inclined toward approving a nominee who would be 68 years of age they could select a nominee from another institution. We know, as I indicated to you, that they would not be favorably inclined to approve your appointment. Fordham could then lose the Chair altogether, not because our nominee was rejected but because the State preferred the nominee of another institution.

For these reasons, the University is not desirous of pushing the issue but prefers to work with the State nominating someone whose approval would not present difficulties for the State.

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> I am not sure whether legally this constitutes discrimination on the basis of age. In some sense I suppose that all mandatory retirement policies are discriminatory, including Fordham's. At the present, however, it is the context within which we must operate.
>
> I regret, therefore, that on the basis of its perception of the present situation Fordham does not feel as though it should nominate you for the Schweitzer Professorship, as it would definitely have done several years ago.
>
> Again, my best wishes for continued success in your work which will clearly continue well past the age of 70
> (A 62-63)

In October, 1970, a suit was filed under the Civil Rights Act and diversity jurisdiction, claiming a number of causes of action; in particular, the unconstitutionality of exclusion on the basis of age and a breach of contractual relationship between Fordham University and Paul Weiss. On February 5, 1971, the Honorable Harold Tyler dismissed the constitutional claims from the bench and denied a Preliminary Injunction in a decision later reported in writing at 234 F. Supp. 75 (1971). Judge Tyler held "[B]eing a classification that cuts fully across racial, religious, and economic lines...age is less likely to be an invidious distinction...

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Notwithstanding great advances in gerontology, the era when advanced age ceases to bear some reasonable statistical relationship to diminished capacity or longevity is still the future. It cannot be said, therefore, that age ceilings upon eligibility for employment are inherently suspect, although their application will inevitably fall unjustly in the individual case" (A 5). Denial of the injunction was appealed to the Second Circuit Court of Appeals and denied on October 29, 1971, in an unreported decision. Subsequently, the appellees moved for Summary Judgment on November 26, 1971, after completion of depositions, and such a motion was denied on January 7, 1972 by written opinion. The Court denied a demand for a jury trial at that time. In Fordham's answer, as is common in discrimination suits, the answer interposed was that rejection was not based on discrimination but on preference of another. At trial, however, no such person could be found. Paul Reiss said it was Richard Wade, yet members of the

Philosophy Department insisted it was John Smith or perhaps Welfred Sellars.

At the conclusion of the trial, the Honorable Harold Tyler ruled in favor of Fordham and State.

The appeal was heard and affirmed from the bench on June 29, 1972. A timely petition for a rehearing en banc was filed and denied on August 29, 1972.

POINTS OF ARGUMENT

I.

AGE DISCRIMINATION IS UNCONSTITUTIONAL, IN GENERAL, AND IN PARTICULAR WHEN APPLIED TO INDIVIDUALS WITHOUT ANY FINDING OF INDIVIDUAL DISQUALIFICATION.

II.

WHEN A TRIAL COURT CLEARLY DEMONSTRATES PREJUDICE AND PREJUDGMENT BY EXCLUDING EXPERT TESTIMONY, EXHIBITING HOSTILITY TO CLIENT, CASE, AND COUNSEL, ETC. AND THEN DENYING A JURY TRIAL ON FACTUAL ISSUES, THE JUDGMENT SHOULD BE REVERSED.

EXCLUSION FROM EMPLOYMENT ON THE BASIS OF AGE IS UNCONSTITUTIONAL, IN GENERAL; AND IN PARTICULAR HERE, AS APPLIED TO PETITIONER WITHOUT ANY FINDING OF INDIVIDUAL DISQUALIFICATION.

"To be 70 years young is sometimes more cheerful and hopeful than to be 40 years old."

OLIVER WENDELL HOLMES

A. This Case Presents Age Discrimination Squarely to this Court.

Judge Harold Tyler, of the Southern District, ruled that any discrimination on the basis of age was constitutionally correct and issued an opinion accordingly dismissing a number of the causes of action based on age discrimination. This decision was affirmed by the Second Circuit. At trial it became clear that age was a major, if not totally determinative factor, in decisions to renege on promises and exclude petitioner Paul Weiss from even consideration in connection with

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the Schweitzer Chair (A 41). Defendants' three professional witnesses testified that at departmental meetings, petitioner's age was given as the reason for rejection. In particular, Paul Reiss, Academic Vice-President, stated not only would Fordham's retirement policy preclude giving the Schweitzer Chair to petitioner but also he thought petitioner's age might cause the State Board of Education to reject petitioner and Fordham if petitioner's name was put forward as the Schweitzer Chair nominee (A 85-91-94). In correspondence in which he referred to a "commitment" to Paul Weiss, he inquired as to whether age would preclude him (A 55).

This case, therefore, directly presents for the first time to the Supreme Court the question of whether an individual can, consistent with equal protection, be singled out for rejection

soley on the basis of his chronological age. It is petitioner's position that such a general classification to discriminate against people past a certain age is irrational past the point of clear unconstitutionality and that the use of Paul Weiss' age for discrimination against academic employment, is unconstitutionally arbitrary. In particular, the vice of the discrimination is particularly pernicious here where a generalization, arguable at best, is applied without proof of relevancy or reason for applicability to an individual. Such an important issue of discrimination should be dealt with by certiorari for the issue is not only constitutionally crucial but also a common occurrence. See, e.g., practices dealt with in Note, 44 S. Cal. L. Rev. 150 (1971); Nevil Trochin-James, Arbitrary Retirement,

(1967), especially Chapters 7 and 8. It should also be noted that one-third of the pension plans in the United States exclude from benefits those who retire past a certain age. U.S. Dept. of Labor, Pension Plans Under Collective Bargaining, Pt. II, Involuntary Retirement Provisions, BLS Bull. 1259 (1959), Table 17, p. 24.

B. The Justification of Age Discrimination Advanced in this Case Cannot Withstand Critical Scrutiny.

This case presents a classification of exclusion for potential holders of the New York State Schweitzer Chair who are past a certain chronological age. Two classes of people are thereby created. The first is free for offers for the Chair with no mention of age, future productivity, health, etc. The other, of which petitioner is a

perfect example, is classified for exclusion solely on the basis of chronological age--an irrational, baseless exclusion in the intellectual realm. Hoyt v. Florida, 368 U.S. 57 (1961), held that "the Fourteenth Amendment reaches...all...exclusions which 'single out any class of persons for different treatment not based on some reasonable classification'; Hernandez v. Texas, 347 U.S. 475, 478." As this Court stated explicitly in Harper v. Virginia Board of Elections, 383 U.S. 663, 669 (1966),

> "...the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed

> catalogue of what was at a given time deemed to be the limits of fundamental rights. See Malloy v. Hogan, 378 U.S. 1, 5-6. Notions of what constitutes equal treatment for purposes of the Equal Protection do change."

In the case at bar, the District Court Judge, affirmed by the Second Circuit, reached two separate conclusions regard the petitioner's argument that discrimination based upon age is unconstitutional. The first holding was that such discrimination is not prohibited by the Constitution (A 5). See, on the other hand, this Court in Gulf, C. & S. F. R. Co. v. Ellis, 165 U.S. 150, 155 (1897), "[The State] may not say that all men beyond a certain age shall be alone thus subjected."

The second conclusion which led to dismissal of the Civil Rights cause of action based on age discrimination

was that discrimination based upon age simply is not invidious:

> "Notwithstanding great advances in gerontology, the era when advanced age ceases to bear some reasonable statistical relationship to diminished capacity or longevity is still future." (A 5).

This finding had no general or particular foundation in the record made at trial, nor did it have any particular reference to the actual litigation involved, but still served as the basis of dismissal of the causes of action. To bolster this find and Constitutional claim, Judge Harold Tyler argued in support of age discrimination and dismissed all of the actions against it by stating that age is "a classification that cuts fully across racial, religious, and economic lines" (A 4).

Of course, the same is true for race, religion, and wealth, each of which cuts across the other classifications. People of different races have different religions and ages. These unreasoned and unsupported statements justifying age discrimination constitute the opinion that petitioner hopes this Court will examine in the correct constitutional perspective.

C. Classifications Which Exclude Particular Minorities are Unconstitutional.

In general, when actions are made directly against a specific minority, they violate the constitutional mandate.[2/]

2/ For example, many categories besides race are included under the equal protection of the Fourteenth Amendment. See on travel, U.S. v. Guest, 383 U.S. 745 (1965) and Shapiro v. Thompson, 394 U.S. 618 (1969); the legitimacy of birth, Levy v. Louisiana, 391 U.S. 68 (1968); poverty, Griffin v. Illinois, 351 U.S. 12 (1956); Harper v. Virginia Board of Elections, supra, and right to custody of child, May v. Anderson, 345 U.S. 528 (1953), Stanley v. Illinois, 92 S. Ct. 1208 (1972). See also, Central Presbytery v. Black Liberation, 303 F. Supp. 894 (E.D. Mo. 1969).

Yick Wo. v. Hopkins, 118 U.S. 356 (1886). See also Ex Parte Virginia, 100 U.S.339 (1880); Concordia Fire Insurance Co. v. Illinois, 292 U.S. 535 (1935). See opinion of Douglas, J. in Furman v. Georgia, 32 L. Ed. 2d 35 (1972). Selective enforcement based on an improper standard such as race, religion or other arbitrary classification, Oyler v. Boles, 368 U.S. 448, 456 (1962), violates the equal protection clause. See also Carrington v. Rash, 380 U.S. 89 (1965) and citations therein.

D. The Aged as a Minority Group are Entitled to the Full Scope of the Equal Protection Clause.

Discrimination based on age, unless justified by some rational reason, must automatically be struck down under the Fourteenth Amendment guarantees. The aged

have always been recognized as a minority group in the administration of public benefit programs and in other areas. See, e.g., Social Security Laws, 42 U.S.C. 402 et seq. See also, Milton Barron, The Aged American, 1961 , Ch. 3, "The Aged as a Quasi Minority Group," p. 65. See, e.g., Economics of Aging: Toward a Full Share in Abundance, by Special Senate Committee on Aging (12/31/70).

The reason for such exclusionary behavior given by the Court below was the claim that advanced age usually results in the decline of professional ability. Thus far, no one in this case has asserted reasons to believe this and no findings of fact either in general or as applied for professional candidates to the Schweitzer Chair were made. The assumption for dismissal was that the aged are always infirm—

even here in the world of creative academics. In fact, scientific studies indicate the opposite of such assumptions of intellectual failure associated with years. See, for example, "Age, Intelligence and Learning" by Russell F. Green in Industrial Gerontology, No. 12, Winter 1972, pp. 29-40; see also Nevil Tronchin-James, Arbitrary Retirement, 1962 particularly Chapters 7 and 8.[3/] What these and other studies show is that there is no set pattern of decline in intellectual productivity and indeed many people have increased productivity in their 70's, 80's and 90's.

3/ A twelve-page representative list of accomplishments of people beyond the chronological year of 69, accumulated in the Addendum was annexed to the brief in the Second Circuit and would be submitted in augmented form to this Court if certiorari were granted.

Evidence to the contrary is not available and was not used as a basis of dismissal. Yet such evidence must be demanded in cases of age discrimination not only because any classification which excludes individuals on a characteristic must be justified, but also because the scientific evidence in the intellectual domain involved here is, in fact, to the contrary.

E. The Particular Age Chosen to Exclude is Arbitrary.

The use of 65 as a retirement age in this country originates directly from Otto von Bismarck's old-age legislation. His was the first such law in any of the Western countries and one which served as a model for many old-age insurance laws in other countries in addition to the United States. At the time his law took effect, the average life expectancy

in Germany was 35. It is now twice that in the United States. See 113 Cong. Rec. 31256, 1967, Comments of Senator Young at 31256. Even if one were to argue that there was a decline in productivity with advanced chronological age, and that general principle had been established in this case, a reason would still have to be given for why the age of 65 or any other age, now so arbitrarily given, is the appropriate age to so classify, exclude and punish. Not only is there no evidence, as petitioner argues, nor can there be for the claim that advanced age necessarily means loss of intellectual productivity, but also there is no evidence as to why this particular age is the one moment for the intellectual grim reaper. There must be reason not only to exclude for advanced years but

reason for the number used to close the gates to the groves of academe for those found with the unwanted accumulation of years.

F. Applying the Irrebuttable Presumption of Aged Infirmity Without Particular Proof Violates Equal Protection.

Even if one were to assume that age were a relevant factor and that, in particular, the age of 65 or 68 or 70 were the relevant age for age discrimination, what has occurred in the present case would still be unconstitutional. It has been held in many lower courts that in spite of general presumptions of general physical characteristics, no matter how reasonable, or statistical probabilities, no matter how weighty, individuals may, nonetheless, not be excluded particularly from employment, unless it has been shown that that

general characteristic applies to that individual excluded on that generalized reason. See e.g., Weeks v. So. Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969); Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

Petitioner has the Constitutional right to be free from generalizations made about members of his class. In this connection, the case of Bowe v. Colgate Palmolive Co., 416 F.2d 711, 718 (7th Cir. 1969) is instructive. In that case, the company refused to let women have jobs which required lifting weights of more than 35 pounds because of claims of biological inadequacy. The Court in that case struck down this work provision to hold that "all workers...[must] be afforded a reasonable opportunity to demonstrate his or her ability to perform more strenuous jobs on a regular

basis." See also Cheatwood v. So. Central Bell Tel. & Tel. Co., 303 F. Supp. 754 (M.D. Ala. 1969).[4/] See also Rosenfeld v. Southern Pacific Co., 293 F. Supp. 1219 (C.D. Cal. 1968); U.S. v. York, 281 F. Supp. 8 (D. Conn. 1968). These cases involved physical abilities--petitioner's involves intellectual abilities--an even easier case for the right to be free of generalizations to exclude. Can anyone maintain statistics dictate certainties in philosophy or generalizations about age, or can base remotely accurate predictions (for administrators, agencies, courts, etc., to make) about the quality of future philosophical productivity?

4/ The fact, for example, that few Puerto Ricans go to colleges does not justify blanket exclusion; and even in sports, if old football players throw less well, George Blanda is still a good quarterback and place kicker.

The Albert Schweitzer Chair would be non-existent if the same standard had been applied to the late Dr. Albert Schweitzer, many of whose major achievements came after he was older than petitioner. The absurdity of such blanket generalizations in the intellectual realm is made clear by the people we entrust our lives to: politicians, statesmen, judges, doctors, lawyers. All these thinking men face no age limitation. So, too, should professors of philosophy not face rejection based on chronological age alone. In no way in this case has there been an attempt to demonstrate that this particular class prejudice applies particularly to petitioner (or is a bona fide occupational qualification). At trial it was agreed, without question, that there was no dispute about petitioner's

future intellectual productivity as described by defendant Paul J. Reiss as certain to "continue well past the age of 70." In the dismissal of the complaint, Judge Harold Tyler commented the classification by age might "fall unjustly in the individual case" (A 5). Such particular unjust result did not appear to bother the Second Circuit either. Paul J. Reiss, Vice-President and defendant testified that he thought it was all right to exclude Paul Weiss on the basis of age for a job on the basis of something he had "no control over." So, too, one has no control over whether one is Black, female, Jewish or redheaded but does have the right to be free from prejudice or generalization about the group. Such particular unjust results, as here, are precisely what is forbidden

by the Constitution and the rights of individuals, Discrimination, philosophers, lawyers and Judges, no doubt agree, means at least in part applying judgments on irrelevant characteristics regardless of how well you generalize.

G. Denying Petitioner Employment Violates First, Fifth, and Fourteenth Amendments; and Any Such Classification Creating Such Denial is Suspect and Requires Strict Scrutiny.

It should be noted here what is sought in this case. The petitioner seeks the right to a Chair which has been promised him and whose enjoyment will enable him to accomplish many objectives, including the association where and with whom he would like. "The right to hold specific private employment and to follow... profession...comes within the liberty and 'property' concepts of the Fifth Amendment." Greene v. McElroy, 360 U.S. 474 (1959).

> "A man's job is his way of life. It is his bond with reality, his contact with the community, his form of participation in the business of purposeful existence. A man's job identifies him with society. It makes him a social and civilized person. He is securely attached to his job and through it to the life of society." Sondag, Forced Retirement in Prime of Life Called Absurd Waste, Employment Service Review of the U. S. Department of Labor, July-August, 1968.

See Pickering v. Board of Education, 391 U.S. 563 (1968).[5/]

By classifying to reject solely on the basis of age, the State inhibits the giving and receiving of information to the detriment of student, teacher and university community. Cf. Lamont v. Postmaster General, 381 U.S. 301 (1965).

This Court has shown itself extremely sensitive to classifications which infringe upon a basic civil right, such as association and dissemination of ideas.

5/ See in lower courts Board of Trustees v. Davis, 396 F.2d 730 (8th Cir. 1968); Rolfe v. County Board of Education, 391 F.2d 77 (6th Cir. 1968); Rainey v. Jackson State College, 435 F.2d 1031 (5th Cir. 1970); Birnbaum v. Trussel, 371 F.2d 672 (2nd Cir. 1966); Wald v. Stanley County Board of Education, 378 F.2d 275 (4th Cir. 1967); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966); Franklin v. County School Board, 360 F.2d 325 (4th Cir. 1966); Bomar v. Keyes, 162 F.2d 136 (2nd Cir. 1947).

Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). Where a basic civil right is involved, even "rational purpose" (absent here) for differentiation is not an acceptable justification. Loving v. Virginia, 388 U.S. 1, 8, 12 (1967). Where a classification touches on a fundamental right, such as association for idea dissemination, "its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest." Shapiro v. Thompson, 394 U.S. 618, 639 (1969). As we have demonstrated, age discrimination cannot stand up even to a test of minimal rationality and certainly must fail in this constitutional context of intellectual employment.

H. Petitioner was Denied Due Process.

A discriminatory deprivation of

employment is a deprivation both of liberty and property without due process--a constitutional infringement. Greene v. McElroy, supra, at 492. The Court below stated that employment is a question for Constitutional rights only when speech and association are involved (A 4). Yet speech is involved here; and discrimination against a group is unconstitutional whether the group be mute or articulate. The property is petitioner's employment. The liberty is his freedom to practice his chosen profession, associate, learn, teach and disseminate information.[6/]

6/ See in lower courts, e.g., Olsen v. Regents of the University of Minnesota, 301 F. Supp. 1356 (D. Minn. 1966); McConnell v. Anderson, 316 F. Supp. 809 (D. Minn. 1970).

In short, petitioner's exclusion from the Schweitzer Chair is unconstitutional for the following related reasons:

1) The classification to exclude intellectuals from employment on the basis of an arbitrarily selected chronological age has no rational basis, and if it did, the reasonable basis of such classification must be demonstrated rather than presumed to justify dismissal of a civil rights suit.

2) In the field of employment and association, this discriminatory exclusion is particularly suspect because it infringes upon basic rights and, thereby, demands strict scrutiny.

3) Perhaps, most important, petitioner Professor of Philosophy Paul Weiss, has a right to be free from generalization or prejudice about the class to which he belongs when seeking fulfillment of employment. His suitability for a particular position, privilege or right must be determined on the appropriate individual basis.

The courts have seen fit to strike down discriminations on the basis of race, sex, poverty, travel, religion and family. This case squarely presents the classification to exclude petitioner based on chronological age yet justified only by an abstract and unsupported claim of statistical inference. The time has come to discard yet another invidious distinction unjustly applied.

II.

THE TRIAL COURT'S PREJUDICE, CONDUCT AND RULINGS WERE SO CLEARLY AND GROSSLY ERRONEOUS AS TO CONSTITUTE A DENIAL OF DUE PROCESS.

Many actions of the Trial Court were clearly reversible error. Some in isolation and all in combination were sufficiently extreme that this Court should take jurisdiction to correct the violations of due process and reaffirm principles of fair trials for all the lower courts. See, e.g., Thompson v. Louisville, 362 U.S. 199 (1960). The Appendix to this petition contains some examples of judicial error, but the whole record must be read to perceive the extremity of the miscarriage of justice. 7/

7/ For one among many examples, the Court addressed petitioner's counsel

cont'd.....

At the first hearing on the case, Judge Harold Tyler dismissed the constitutional issue from the bench and concluded that there was no jurisdiction. Counsel for petitioner pointed out that there was diversity jurisdiction on breach of contract, to which the Judge replied, "I didn't really think you were pressing very seriously the breach of contract

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fn. 7 cont'd on at least eleven occasions by his first name, a condenscension and revelation of attitude not necessary and not employed on other occasions where the Court found it possible to address him with the title 'Mister.' See Hamilton v. Alabama, 376 U.S. 650 (1964). In substance: numerous philosophers were prepared to testify that the correspondence the Court had before it would be understood by all academics and particularly philosopers as unequivocally binding on Fordham to give petitioner the Schweitzer Chair when the funds became available to it. Judge Tyler totally prevented such testimony. Such a ruling is directly against all the relevant law. See, in general, Corbin Contracts, 544, 555. Restatement of Contracts, 246, 248 in

claim." It was the first cause of action and a subject of extended discussion in petitioner's memorandum of law present at that time. When motion for Summary Judgment was denied in the Opinion attached in the appendix, it became quite clear that the trial judge to whom it had initially been assigned for all purposes was convinced petitioner had little or no chance on the merits. His case, as that opinion revealed,

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fn. 7 cont'd.... N.Y., Walls v. Bailey, 49 NY 464 (1872) particularly 469-70; In Re Wampfler's Estate, 123 NY 52735 (1953); Mencher v. Weiss, 306 NY 1, 114 N.E. 2d 177 (1953, particularly 5-6. Udell v. Cohen, 122 NYS 2d 522 (1963); Thompson v. Sloan, 23 Wend. 71 (1840); Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960); in general Ermoleiff v. R.K.O., 19 Cal. 543, 122 P2 3 (1942); Hearst v. W. J. Lake Co., 141 Ore. 306, 16 P.2d, 627 (1932); Kregliner and Fernau v. Webb, 162 F. Supp. 695 (E.D. Pa. 1957); in Law Reviews: Custom and Trade Usage, 55 Colum. L. Rev. 1193 (1955) and cases cited. A concommitant error was made in preventing

would rest in part on the credibility of witnesses. Yet, as became clear subsequently, Judge Tyler had already prejudged petitioner's credibility--believing he had changed his memory post-litigationally when petitioner stated unequivocally that he had a binding agreement and detailed all the ways he relied on it, even though a more common sensical point of view would lead to a belief that an

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fn. 7 cont'd.... the draftsman Chairman Robert Neville from testifying as to how he meant the words used and how he explained them. Cf. Pennsylvania Co. v. Wilmington Trust Co., 166 A2 726 (Del. Ch. 1960); and in ruling the State Department of Education could not be asked its involvement by giving money and facilities for use in age discrimination. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Hammond v. University of Tampa, 344 F.2d 951 (5th Cir. 1965). In addition, Judge Harold Tyler ruled as a question of law that the offering letter was not an offer for it was contingent on funds being available. Such a ruling is clearly wrong; Corbin on Contracts at 649:

academic would sue for the first time in his life only when he believed he had a contract, relied on it, and had it breached. At this point, a jury demand, or in the alternative, a motion for a jury was before the Court. Yet knowing of his predisposition, the jury demand was denied. Such denial ran counter to the spirit of such cases as Dairy Queen v. Wood, 369 U.S. 469 (1962). Moreover, the amended complaint

---

fn. 7 cont'd....

> "In such cases, it is quite incorrect to say that until the event occurs there is no contract; neither party has the privilege of revocation and no further expression of assent by the two parties is necessary. The binding character of such a conditional contract has been recognized by sustaining a bill for specific performance and injunction." Corbin on Contracts at 629: "[A]n

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for which the jury demand was made raised new issue which required a jury trial. Cataldo v. E. I. Dupont, 253 F. Supp. 235 (S.D.N.Y. 1966); Western Geophysical Co. v. Bolt Associates, 440 F.2d 765 (2nd Cir. 1971); Jackson v. Airways Parking, 297 F. Supp. 1366 (1969).

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fn. 7 cont'd....

> agreement [is]...a valid contract...[when] both the exchanged promises are expressly conditional on one and the same event [citations omitted]."

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-737

PAUL WEISS,

Petitioner,

against

REVEREND MICHAEL WALSH, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS WALSH, REISS AND ROTH IN OPPOSITION TO THE PETITION

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December 18, 1972

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IN THE
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OCTOBER TERM, 1972
NO. 72-737

PAUL WEISS,

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- against -

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Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR RESPONDENTS WALSH, REISS AND ROTH IN OPPOSITION TO THE PETITION

Opinions Below

The opinion of the United States District Court for the Southern District of New York (Tyler, J.), dated February 24, 1971, denying Petitioner's motion for a preliminary injunction and granting in part Respondents' motion for a judgment on the pleadings is contained in Petitioner's Appendix at page A-1. The result of the second part of this decision was to dismiss portions of Petitioner's original com-

plaint (Petitioner's Appendix, page A-64) and to give him leave to replead. A second complaint was served by Petitioner on March 16, 1971 and is set forth at page A-7 of the Appendix to this brief.

The opinion of the United States Court of Appeals for the Second Circuit (Mansfield, J.), dated October 29, 1971, affirming the February 24, 1971 opinion of the District Court is set forth at page A-1 of the Appendix to this brief.

The opinion of the United States District Court for the Southern District of New York (Tyler, J.), dated January 7, 1972, denying Respondents' motion for summary judgment is set forth at page A-10 of Petitioner's Appendix. This decision also struck Petitioner's jury demand because it was filed too late and denied Petitioner's request for a jury trial notwithstanding his failure to make a proper demand.

The opinion of the same District Court (Tyler, J.), dated March 7, 1972, after trial is set forth at page A-23 of Petitioner's Appendix. This opinion was filed by the trial court as its findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

The March 7, 1972 opinion of the District Court was affirmed without opinion by the United States Court of Appeals for the Second Circuit on

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June 29, 1972. On August 29, 1972 the Court of Appeals denied Petitioner's motion for rehearing in banc.

Jurisdiction

Jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

Does the factual finding of the District Court, unanimously affirmed by the Court of Appeals, that there was no discrimination in employment against Petitioner because of his age of 69 raise a substantial question which requires review on certiorari by the Supreme Court of the United States?

Statutes Involved

The statutes involved in this case are the Age Discrimination in Employment Act of 1967, 81 Stat. 602, 29 U.S.C.A. §621 et seq. and the New York Executive Law §296 (McKinney 1972). Their pertinent text is as follows:

Age Discrimination in Employment Act of 1967
29 U.S.C.A., Chapter 14

§ 623. Prohibition of Age Discrimination - Employer Practices

(a) It shall be unlawful for an employer -

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

* * *

§ 631. Age Limits

The prohibitions in this chapter shall be limited to individuals who are at least forty years of age but less than sixty-five years of age.

New York Executive Law

§ 296. Unlawful Discriminatory Practices

3-a. It shall be an unlawful discriminatory practice:
(a) For an employer or licensing agency, because an individual is between the ages of forty and sixty-five, to refuse to hire or employ or license or to bar or to terminate from employment such individual, or to discriminate against such individual in promotion, compensation or in terms, conditions or privileges of employment.

* * *

But nothing contained in this subdivision or in subdivision one of this section shall be construed to prevent the termination of the employment of any person who is physically unable to perform his duties or to affect the retirement policy or system of any employer where such policy or system is not merely a subterfuge to evade the purposes of said subdivision; nor shall anything in said subdivisions be deemed to preclude the varying of insurance coverages according to an employee's age.

Statement of the Case

Petitioner, Paul Weiss, was a professor of Philosophy at Yale University until June of 1969, when he was required to retire at age 68 pursuant to that University's mandatory retirement policy. In anticipation of retirement, during 1968 Petitioner entered into negotiations with a number of universities in an

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attempt to secure a teaching position to commence in September of 1969.

In January and February of 1968 officials at Fordham University offered Petitioner a new teaching position at Fordham which was to be designated a "University Professorship" and was to commence in September of 1969. Petitioner rejected this offer, indicating to Fordham that he desired more money and a longer contract than was offered.

Also in early 1968, Fordham hoped that it might regain its state-funded "Schweitzer Chair" by September of 1969. The Schweitzer Chair was not related to the University Professorship, and the funds from the State were at that time unavailable because of a ruling by the State Attorney General that Fordham was ineligible to receive them because of its alleged religious affiliation. Fordham was contesting this ruling.

In April of 1968, Fordham faced serious financial difficulties and found it necessary to withdraw its offer to Petitioner of the University Professorship. In the same April 22, 1968 letter in which an official of Fordham withdrew the offer (which Petitioner had never accepted), Fordham informed Petitioner that it was then its intention to offer Petitioner the Schweitzer Chair nomination if

the Chair were returned to Fordham. (Petitioner's Appendix, page A-54).

Fordham at no time ever offered the Schweitzer Chair to Petitioner; three letters to Petitioner in April of 1968 mention the possibility of nominating him for the Chair in September, 1969. Petitioner's interest in the status of the Chair and the possibility that it might be offered to him for September of 1969 continued during the summer of 1968.

In September of 1968, a professor at Fordham wrote Petitioner that it appeared that Fordham would not be able to have a Schweitzer professor for September, 1969, and advised him to accept some other offer. Petitioner responded on October 1, 1968 that he had a firm offer for another post, which he would undoubtedly accept in a few weeks.

In December of 1968 Petitioner accepted a teaching position at Catholic University, and entered into a contract for a term of five years. There were no further communications between Petitioner and Fordham officials concerning the Schweitzer Chair until late summer of 1970. By that time Fordham had regained the Schweitzer Chair and was considering other candidates (Petitioner's Appendix, page A-41). Also, a new group of individuals occupied the key university administrative positions. A friend of Petitioner's on

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the faculty brought to the attention of the new Fordham administration that Petitioner had been considered for the Schweitzer Chair two and one-half years earlier. He told Fordham's officials that Petitioner knew the Chair was now available and was still very interested in being chosen for it. The Academic Vice President decided to inform Petitioner, in a diplomatic manner, that he was no longer being considered for the Schweitzer Chair. This official did so inform Petitioner, and gave age as the reason as a device to "cushion the blow", rather than the true fact that the Fordham Philosophy Department felt that other candidates were more suitable in view of the "needs and objectives of Fordham". (Petitioner's Appendix, page A-43).

Petitioner instituted this action of October 29, 1970, alleging that Fordham had withdrawn an offer of the Schweitzer Chair "solely on the basis of age". Petitioner (born in May, 1901) claimed this constituted unlawful and unconstitutional age discrimination for which he was entitled to legal and equitable relief. Petitioner did not allege a contract or a breach of contract in his original complaint (Petitioner's Appendix, page 64).

In February of 1971 all Respondents moved for a judgment on the pleadings, and Petitioner cross-

moved for a preliminary injunction. Petitioner's motion was denied, and the District Court dismissed the complaint, but permitted Petitioner to file an amended complaint pleading breach of contract, selective enforcement of an age criteria, and exceeding statutory authority. Petitioner thereafter filed an amended complaint (Appendix hereto, page A-7) along these lines, demanding $1,000,000 damages, a judgment that Respondents violated his rights under the Fourteenth Amendment and under 42 U.S.C. § 1983 in failing to award him the Schweitzer Chair, and a permanent injunction requiring Respondents to give him the Chair "until he chooses to retire from it".

Petitioner then appealed from the denial of his motion for a preliminary injunction. While that appeal was pending, Petitioner in July, 1971, again moved the District Court for a preliminary injunction, this one regarding Fordham's use of the Schweitzer funds. This motion was denied. Petitioner filed a second interlocutory appeal, which was consolidated with the first. In an unreported decision dated October 29, 1971, the Court of Appeals rendered an opinion affirming both decisions (Appendix hereto, page A-1).

Petitioner filed his original complaint on October 29, 1970, which Respondents answered with denials on December 14, 1970. The amended complaint

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was served on March 16, 1971 and answered on March 26, 1971 with similar denials. Petitioner's demand for a jury trial was not filed until July 21, 1971. In a memorandum decision dated January 7, 1972, the District Court granted Respondents' motion to strike the jury demand as not timely filed. The court also denied plaintiff's oral request at argument that a jury trial be had despite the absence of a timely demand. The January 7, 1972 decision also denied a motion by Respondents for summary judgment because of possible material fact issues.

This action was tried in the United States District for the Southern District of New York before Judge Harold R. Tyler, Jr. in March 1972. Following a full trial on the merits, the District Court found that neither Fordham nor any agent of the State of New York had discriminated against Petitioner because of his age; that Petitioner did not establish any breach of contract; that Petitioner did not establish any inducement to change his position entitling him to equitable relief; that Petitioner did not establish any denial of equal protection; and that Petitioner did not establish any arbitrary or discriminatory application of any law by the State of New York (Petitioner's Appendix, pages A-23-51). The District Court thus dismissed the complaint on its merits.

The Court of Appeals for the Second Circuit affirmed without opinion, and denied Petitioner's request for an in banc rehearing.

Petitioner here disputes the factual determination rendered by the District Court and affirmed by the Court of Appeals that there was no age discrimination practiced against Petitioner, and he seeks to have this Court review that finding on certiorari. This is a key element in Petitioner's whole argument, for on it is hinged whether a Constitutional issue could even be present in the decision below.

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Reasons for Denying Writ

POINT I

The Record Does Not Support Petitioner's Factual Claim of Age Discrimination

The Petition is based upon Petitioner's conclusory factual allegations that he was unlawfully discriminated against because of age. This factual claim is not supported by the record before this Court. Petitioner urges this Court to review the decisions below and to entertain his argument that discrimination in employment on the basis of age is unconstitutional, whether in general or against Petitioner selectively. Respondents submit that this Court should deny the Petition for the reason that the hypothetical proposition of law urged by Petitioner was rendered unnecessary at trial and is academic at this point.

Prior to discovery and trial, and shortly after the suit was initiated, all of the Respondents moved for judgment on the pleadings on the grounds that the original complaint (Petitioner's Appendix, page A-64) failed to state a claim for which relief could be granted. The District Court granted this motion in part, and its opinion reflects its determina-

tion, viewing the facts most favorably for the Petitioner, that Petitioner's theory that age discrimination in employment is unconstitutional or somehow unlawful, was totally lacking in legal merit (Petitioner's Appendix, pages A-1 through A-9). However, with leave of Court, Petitioner filed an amended complaint in which he pleaded unconstitutionally selective age discrimination as well as breach of contract.

At trial, Petitioner attempted to prove selective discrimination, that is, that he alone was discriminated against because of his age while others similarly situated were not. Of course, it was first necessary for him to prove that he indeed was the victim of age discrimination. Therefore, at trial Petitioner presented all of the evidence he could produce in support of his general claim of age discrimination. Nevertheless, Petitioner was unable to prove any age discrimination, general or selective, and the Court found specifically that "Fordham University did not discriminate in terms of age" (Petitioner's Appendix, page A-47). In addition, the Court specifically found that "There is no evidence direct or indirect of any discrimination express or implied, witting or unwitting on the part of the Board of Regents or the State Commission of Education." (Trial Record, pages 500-501.) Accordingly,

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Petitioner's discrimination claim failed solely because of the trial court's factual determination. And in the final decision after trial it was never necessary for either the District Court or the Court of Appeals to consider the question of the constitutionality the alleged age discrimination, whether selective or non-selective, and thus they did not consider the question. This is consistent with decisions of this Court which hold that where the resolution of a question is not necessary for a decision in a matter at bar, it need not be answered. U.S. v. Worley, 281 U.S. 339, 340 (1930). See also, Walters v. City of St. Louis, 347 U.S. 231 (1954). This reason alone warrants denial of the Petition.

The record fully supports the Court's factual finding that Petitioner was not the victim of age discrimination, and was never even under consideration by Fordham for the Schweitzer Chair in 1970 when Fordham was again able to nominate a candidate for that position, and when the alleged discrimination was claimed to have occurred. The record confirms the finding that Fordham only contacted Petitioner in 1970 motiviated by "good faith and indeed unusual sympathy" to inform him that he was not in consideration as a possible nominee for the Schweitzer Chair at that time (Petitioner's Appendix, page A-44 through A-47).

This Court has uniformly refused to grant certiorari to review such factual determinations, United States v. Johnson, 268 U.S. 220, 227 (1925), particularly where there are concurrent findings by the District Court and the Court of Appeals. Berenyi v. District Director, Immigration and Naturalization Service, 385 U.S. 630, 635 (1966); and Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949), opinion on rehearing, 339 U.S. 605 (1950).

POINT II

Even If Petitioner Had Been Able to Prove Age Discrimination, Petitioner's Claim Would Nevertheless Fail to State a Cause of Action Under the Constitution

Respondents submit that the novel proposition of law put forth by Petitioner is hypothetical and assumes facts contradicted by the findings of the trial court and not supported by the record. Nevertheless, even if Petitioner had been able to prove his allegations of age discrimination, he still would not state a claim under the Federal Constitution.

At common law, the relation of employee and employer is entirely a matter of contract, freely and voluntarily entered into by employer and employee. Adair v. United States, 208 U.S. 161, 184 (1908); NLRB v. Knoxville Pub. Co., 124 F.2d 875 (6th Cir.

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1942). The employer has the absolute right to select whatever employees he wishes, and to hire or refuse to hire in his uncontrolled discretion. Reinforce Inc. v. Birney, 308 N.Y. 164, 124 N.E.2d 104 (1954).

Plaintiff's Constitutional claim is unsubstantial and plainly without merit. The Constitution does not generally create any right to continued employment. Hopkins v. Wasson, 227 F.Supp. 278 (E.D. Tenn. 1962), aff'd, 329 F.2d 67 (6th Cir. 1964), cert. denied, 379 U.S. 854 (1964). In Carraway v. Jefferson Parish School Board, 251 F.Supp. 462 (E.D. La. 1966), the Court held, at page 465:

> "[T]here is a protected 'right to employment' only where Congress or the Courts find that such a right is necessary to the preservation or effectuation of some other constitutional or statutory right. Employment per se is not a protected right; the due process clause of the fourteenth amendment is inapplicable to dismissals from employment, even from public employment, because there is nothing for it to operate on and prevent deprivation of."

Mere form of words alleging a violation of the Constitution and labelling the suit as one to enjoin unconstitutional discrimination is insufficient to state a cause of action without some support for the complaint in fact or law.

Petitioner's citations are not in point. They are cases which concern interference with basic constitutional rights. Here there is no constitutionally protected right to be free from

discrimination based upon age. Never has equal protection or due process been given such an interpretation, particularly where federal and state legislation cover the issue and it was not deemed necessary by the respective legislatures to enact special protections for those beyond a certain maximum age.

The Petition on its face clearly indicates the absence of any constitutional prohibition of age discrimination, and its quotation of a passing dictum from Gulf, C. & S. F.R.Co. v. Ellis, 165 U.S. 150 (1897) appears to be the only legal authority which Petitioner can muster. The sole issue in that case was the constitutionality of a Texas statute which awarded attorney's fees to certain plaintiffs who brought successful claims against railway companies. The language cited by Petitioner at page 15 of the Petition was extracted from examples given by the Court of the arbitrariness of awarding attorneys fees to one group of defendants and not to another.

More relevant is the recent decision in Oregon v. Mitchell, 400 U.S. 112 (1970) in which the Court was faced with the "Voting Rights Act Amendments of 1970", which, in effect, declared that the States could not discriminate against persons over 18 and deny them their fundamental right to vote in State elections solely because of their age, i.e., because

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they had not yet reached the age of 21. The Court determined that the Fourteenth Amendment could not even support this affirmative legislative action by Congress to halt claimed denials of equal protection in the form of age discrimination in state and local elections. Given this ruling, it is apparent that the Fourteenth Amendment will not support Petitioner's request below for judicial relief from the alleged employment discrimination based on age.

Petitioner's claim ignores the extensive body of statutes which have found age to be a reasonable basis for classifying and regulating conduct. It also ignores the reasoned findings of the United States Congress and of the New York Legislature, which both have passed positive legislation prohibiting age discrimination in employment, but explicitly limiting this protection to persons between 40 and 65. The pertinent provisions of these statutes are set forth below at "Statutes Involved". The deliberations of Congress, the New York Legislature (and indeed almost all of the states*) directly rebut Petitioner's

* At least sixteen states in addition to New York have positive legislation prohibiting age discrimination in employment but explicitly limiting this protection to persons under a specified age, which is in no use over 65. See CCH Employment Practices Guide, State Laws on Discrimination on Account of Age, ¶20,100 - ¶28,902.

arguments that there is no rational ground for the application of uniform mandatory retirement rules by an employer. The fact that Petitioner and others who are over 65 main remain at a relative disadvantage because of such remedial statutes does not mean that they are necessarily denied equal protection. James v. Valtierra, 402 U.S. 137, 142 (1971). It is well established that only "irrational discrimination" is precluded by the equal protection clause. A statute is not invalid under the Constitution because it might have gone further than it did. Goesaert v. Cleary, 335 U.S. 464, 466 (1948).

Therefore, even if it had been necessary to resolve the legal question raised by the Petitioner as part of the final decision below, respondents submit that the issue is clearly lacking in merit and not a question of importance which is in the public interest to be decided by this Court. This is particularly the case where no Circuit Court of Appeals, including the one which affirmed the decision in the instant case, has ruled one way or the other on the issue here sought to be reviewed.

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POINT III

This Case Involves No Important Question of Federal or Constitutional Law

Petitioner seeks review on a Writ of Certiorari of a judgment of the District Court and a unanimous Court of Appeals, but has not indicated any "special or important reasons" therefor as required by Rule 19 of this Court, and in point of fact there are none.

Petitioner does not rely on any of the specific reasons set forth in Rule 19(1)(b), but requests that this Court resolve a hypothetical legal proposition which is not supported by the facts and findings contained in this record.

Petitioner's actual attack on the judgment below is not upon any legal determination which this Court may properly consider, but rather upon the factual finding that there was no age discrimination. Such a factual issue is important only to the particular parties involved as distinguished from the general public, and hence are not "important" as interpreted by this Court as a requisite for the granting of a Writ of Certiorari. Rice v. Sioux City Cemetery, 349 U.S. 70, 79 (1955). Similarly, the charges noted in Petitioner's second point are conclusory, undocumented, and were fully reviewed by

the Court of Appeals. There is no basis for this Court's taking the case to review Petitioner's claim of an unfair trial, particularly in light of his failure to move for a new trial and in light of the Court of Appeal's unanimous affirmance. This Court does not and should not grant writs merely to give the defeated party in the court below another hearing. Magnum Co. v. Coty, 262 U.S. 159, 163 (1923); Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 531 (1957) dissent of Frankfurter, Jr.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Dated: December 18, 1972

Respectfully submitted,

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New York, New York
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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 43, 237 September Term 1971

Argued: September 27, 1971 Decided: October 29, 1971

Docket Nos. 71-1398, 71-1852

- - - - - - - - - - - - - - - - - - -

PAUL WEISS,

Plaintiff-Appellant,

-against-

Reverend MICHAEL WALSH, S.J., in his capacity as President of Fordham University; PAUL J. REISS, in his capacity as Vice-President for Academic Affairs of Fordham University; ROBERT ROTH, S.J., in his capacity as Chairman of the Department of Philosophy of Fordham University; and EWALD B. NYQUIST, in his capacity as Commissioner of Education of the State of New York,

Defendants-Appellees.

- - - - - - - - - - - - - - - - - - -

Before LUMBARD, MANSFIELD and OAKES, Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Harold R. Tyler, Judge, denying plaintiff's motion for a preliminary injunction restraining defendants from withdrawing alleged offer to him of the Albert Schweitzer Chair of Humanities at Fordham University or from offering it to anyone other than plaintiff.

Affirmed.

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MANSFIELD, Circuit Judge:

Paul Weiss, an outstanding scholar and distinguished Professor of Philosophy, appeals pursuant to 28 U.S.C. §1292(a)(1) from the district court's denial of a preliminary injunction which would, among other things, enjoin defendants from withdrawing the alleged offer to him of a professorial chair or seat known as the Albert Schweitzer Chair in Humanities (the "Chair"), created by §239 of the New York Education Law and awarded by the State of New York to Fordham University ("Fordham"). For the reasons hereinafter stated we affirm.

In an action commenced in the district court on October 29, 1970, Weiss sought a declaratory judgment, injunctive relief, and $1,000,000 damages based on defendants' alleged violation of the federal Civil Rights Act, 42 U.S.C. §1983. The court's jurisdiction was invoked pursuant to 28 U.S.C. §1343(3), (4). The first cause of action of the complaint claims that after Weiss, then 69 years old, accepted Fordham's offer of the Albert Schweitzer Chair, subject to approval by the New York State Education Department, the defendant Reiss, Fordham's Vice President for Academic Affairs, stated that the State Board of Education had informed him that "they would not grant funds to the Albert Schweitzer Chair if a man of plaintiff's age was appointed but that they would give the Albert Schweitzer Chair to Fordham" (Compl. Par. 5). It is alleged that thereafter defendants, in violation of Weiss' First, Fifth, and Fourteenth Amendment rights, discriminated against him on the basis of his age by withdrawing the offer. Additional causes of action sought relief on the ground that defendants' conduct violated §239 of the New York Education Law, §3027 of the New York Education Law, §2577 of the New York Public Authority Law, The Older Americans Act of 1965 (79 Stat. 218, 42 U.S.C. §§3001, et seq.), and §296 of the New York Executive Laws. Attached to the complaint were relevant letters selected from correspondence between Weiss (or his representative) and Fordham officials during the period from April 22, 1968 to October 22, 1970.

Defendants filed answers denying, among other claims, that Fordham made an offer of the Chair to Weiss or that he accepted such an offer. They further allege that the Chair was not offered to Weiss because Fordham had "determined to nominate someone else for that position" and that Weiss had committed himself to work for another institution, thereby disabling himself from accepting such an offer

from Fordham if it should be made.

After defendants moved for judgment on the pleadings, Weiss on January 12, 1971, moved for preliminary injunctive relief. Except for copies of certain letters attached to the complaint, the authenticity of which was not denied, no affidavit, testimony or other proof was offered in support of Weiss' application. He was apparently content to rely entirely upon the letters, since all other material allegations had been denied. On February 5, 1971, at the conclusion of oral argument, Judge Tyler granted defendants' motion in part and denied Weiss' application for preliminary injunctive relief, stating:

> "I am going to deny the motion for injunctive relief because there is an extreme unlikelihood of any success whatsoever on the part of the plaintiff in establishing either his first cause of action, or indeed, any substituted claim that he can make, even one for breach of contract. Not only that, it would be a grave intrusion upon the affairs of Fordham University if this Court, or any other Court that I could think of, were ever to issue an injunction pendente lite requiring Fordham University and the State of New York to refrain to fill any Schweitzer Chair which has been allotted to Fordham University.
>
> "Moreover, I might point out that the plaintiff is undoubtedly not entitled to the very relief which he would only really be entitled to after he succeeded in a trial, and I am highly doubtful whether he will ever be entitled to a trial here on grounds of law."

In an opinion filed on February 25, 1971, which appears at 324 F. Supp. 75, Judge Tyler reaffirmed his denial of preliminary injunctive relief, stating "that plaintiff has failed to show sufficient likelihood of success to warrant freezing the status quo" and partially dismissed the complaint on the ground that it failed as a matter of law to state claims for relief except for claims based on selective or discriminatory application of age criteria, or on conduct in excess of authority delegated to defendants by statute.

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After filing an amended complaint (not part of the record before us), Weiss again moved on July 27, 1971, for preliminary injunctive relief enjoining defendants from spending "funds of the Albert Schweitzer Chair to pay for present faculty stipends and any lecture, seminar, or symposium series or in any way using the funds other than offering the chair to a permanent appointment." The application was denied by Judge Tyler in open court on July 30, 1971, for failure to show that the expenditures would violate applicable state law.

Upon this interlocutory appeal the principal issue is whether the district court's denial of preliminary relief amounted to an abuse of discretion. Clairol, Inc. v. Gillette Co., 389 F.2d 264 (2d Cir. 1968); Societe Comptoir De L'Indus. v. Alexander's Department Stores, Inc., 299 F.2d 33 (2d Cir. 1962). In resolving that issue we recognize that in seeking preliminary relief plaintiff assumed the burden of showing probable success on the merits and possible irreparable injury to himself or, if his showing of probable success should be a limited one, that the balance of hardships tipped decidedly in his favor. Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319, 323 (2d Cir. 1969); Dino De Laurentiis Cinematografica, S.p.A. v. D-150, Inc., 366 F.2d 373, 375 (2d Cir. 1966). In the absence of serious issues of fact such a showing may be made through affidavits. But where material facts are disputed an evidentiary hearing is essential in the interests of fairness and accuracy. SEC v. Frank, 388 F.2d 486, 490 (2d Cir. 1968); Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1204 (2d Cir. 1970).

The record before us is barren of any showing of probable success. Plaintiff did not offer any affidavit proof, much less seek an evidentiary hearing. Thus, in the face of defendants' denial of the material facts, the only uncontroverted evidence is the correspondence attached to the complaint and certain letters attached to Weiss' reply brief as an "Appendix."* This meager evidence fails to make a persuasive showing of the essential threshold facts upon which Weiss' claim depends, i.e., that Fordham

* These letters do not appear to be a part of the record before the district court and would not ordinarily be considered by us. However, they have not been controverted by defendants.

offered him the Chair and that he accepted such an offer. By letter dated April 22, 1968, Arthur W. Brown, Dean of Fordham's Graduate School of Arts and Sciences, advised plaintiff that Fordham planned to offer him the Chair if the funds for it should be allotted by the State to Fordham. Since the State, however, had not allotted the Chair to Fordham and no resources were available, Brown suggested to Weiss that he "take the best offer you have received from elsewhere," adding that if the Chair became available "we shall be at your door again." Thus the letter appears to have been merely a statement of intention. Indeed it was so construed by Weiss in his letter of October 1, 1968, to "Bob" (apparently Robert J. Roth, S.J., Chairman of Fordham's Philosophy Department), in which Weiss stated that his own impending acceptance of another post elsewhere "will not preclude my accepting the Schweitzer Chair at some future time, I think. I will be ready for it, if and when it is offered to me." (Emphasis supplied).

The record before us contains no other evidence relating to an offer of the post until defendant Reiss' letter of September 3, 1970, which disclosed that Reiss understood Brown's 1968 correspondence merely to have indicated "the University's intention, at that time, to nominate you for the Chair" and advised Weiss that he was not to be nominated for the post. In summary, the correspondence between the parties reveals that, while Fordham thought highly of Weiss and indicated in 1968 an intention to offer him the Chair if it should become available, it did not ever make him an offer, and it eventually decided, two and one-half years later, not to do so.

There remains the question of whether Weiss could prove that the decision not to nominate him for the Chair was prompted by discriminatory action on the part of the State of New York or its representatives. Here again the sole evidence proffered is inadequate. Although the correspondence relied upon by Weiss indicates that one reason for not offering the Chair to him may have been his advanced age, it is equally consistent with defendants' contention that Fordham was merely adhering to its regular retirement policy and regulations in effect since 1947, which established a retirement age of 65 years for all members of its faculty, with employment on a half-time basis thereafter being permitted in exceptional cases at the discretion of the Academic Vice President, but in no event to extend beyond the end of the academic

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year during which the faculty member might attain the age of 70. Weiss was 69 years of age at the time of the September 1970 correspondence. The letters of Fordham's administrators indicate that since "The Schweitzer Professor is expected to be appointed in accordance with the University's normal faculty policies" and the State would "assume that an appointee will hold the Chair for an extended period of years," an appointment of Weiss would constitute such a radical departure from Fordham's own university-wide retirement regulations that the State Education Department would refuse to approve it. If these letters, which represent the only evidence before us, were the sole proof offered by Weiss at trial, it would be a far cry from proving discriminatory action on the State's part.

Aside from his failure to establish the likelihood of success on the merits, Weiss has offered no evidence that he will suffer irreparable injury unless a preliminary injunction is granted. It is not surprising to find that as an outstanding scholar in the field of philosophy he has for some time been employed as the Heffer Professor of Philosophy at the Catholic University of America, Washington, D.C. This employment militates against his claim that denial of the Chair causes him irreparable harm. In such a setting damages would provide an adequate remedy. Furthermore, to force him upon an unreceptive administration at Fordham would amount to a disruptive intrusion upon that academic community; and to restrain Fordham during the pendency of the suit from appointing another outstanding academician to the post would deprive the public and the academic community of essential benefits to be derived from utilization of available funds, talents and facilities in an important area of higher education.

In view of Weiss' failure to show any abuse of discretion on the part of the district court in denying preliminary injunctive relief, it becomes unnecessary for us to pass upon the constitutional and other legal issues raised by Weiss and amici curiae, which formed the basis for the district court's partial dismissal of the complaint. That order, not being appealable, is not now before us.

The district court's order is affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAUL WEISS,

Plaintiff,

-- against --

Rèverend MICHAEL WALSH, S.J., in his capacity as President of Fordham University; PAUL J. REISS, in his capacity as Vice-President for Academic Affairs of Fordham University; ROBERT ROTH, S.J. in his capacity as Chairman of the Department of Philosophy of Fordham University; EWALD B. NYQUIST, in his capacity as Commissioner of Education of the State of New York; JOSEPH W. McGOVERN, EVERETT J. PENNY, KENNETH B. CLARK, CARL H. PFORZHEIMER, JR., CHARLES W. MILLARD, JR., JOSEPH C. INDELICATO, EDWARD M. M. WARBURG, MRS. HELEN B. POWER, JOSEPH T. KING, ALEXANDER J. ALLAN, JR., FRANCIS W. McGINLEY, MAX J. RUBIN, THEODORE M. BLACK, STEPHEN K. BAILEY, and HAROLD E. NEWCOMB in their capacities as Regents of The University of the State of New York,

Defendants.

Civil Ac
No. 476

AMENDED
COMPLAI

1. Jurisdiction is based on 28 U.S.C. §§1331, 1332, 1343(3) and (4), 1361, 2201 and 2202.

2. Plaintiff is a citizen and resident of the District of Columbia and Defendants are citizens of the State of New York. The matter in controversy exceeds, exclusive of costs and interest, the sum of $10,000.

First Cause of Action

3. Reverend Michael Walsh, S.J. is President of Fordham University and responsible for its final policy and decisions.

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4. Paul J. Reiss is Vice-President for Academic Affairs of Fordham University and responsible for offering and applying for the Albert Schweitzer Chair.

5. Robert Roth, S.J., is Chairman of the Philosophy Department and responsible for its administration.

6. Ewald B. Nyquist is Commissioner of Education of the State of New York and finally responsible for the administration of the funds for the Albert Schweitzer and Albert Einstein Chairs created by §239 of the Education Law of New York.

7. Joseph W. McGovern, Everett J. Penny, Kenneth B. Clark, Carl H. Pforzheimer, Jr., Charles W. Millard, Jr., Joseph C. Indelicato, Edward M. M. Warburg, Mrs. Helen B. Power, Joseph T. King, Alexander J. Allan, Jr., Francis W. McGinley, Max J. Rubin, Theodore M. Black, Stephen K. Bailey, and Harold E. Newcomb are Regents of the University of the State of New York (hereafter collectively referred to as "The Regents") and responsible, on information and belief, for the approval or disapproval of individuals suggested for the Albert Schweitzer Chair by applicant colleges and universities, and, in addition, for entering contracts with respect to the Albert Schweitzer and Albert Einstein Chairs.

8. Plaintiff is 69 years of age, a Heffer Professor of Philosophy at Catholic University of America, and in excellent physical and mental health.

9. On information and belief, Fordham University, through its officers and employees, including the named defendants, selected plaintiff as the sole recipient of the Albert Schweitzer Chair awarded to Fordham on or about April 22, 1968. This identification was made to appropriate persons in the State Department of Education, which is under the authority and control of defendants Nyquist and the Regents and communicated to plaintiff who accepted his selection and made plans accordingly.

10. On information and belief, an official at the State Department of Education informed Fordham that they would reject plaintiff as a recipient of the Albert Schweitzer Chair solely because of his age.

11. Fordham University has as a consequence of the communication from the State Department since refused to employ defendant as a recipient of the Albert Schweitzer Chair and have now said although he was the selection and did accept the post they refuse to honor said commitment.

12. On information and belief, candidates for the Albert Schweitzer and Albert Einstein Chairs who are older than sixty-five years of age are automatically excluded from qualification for these Chairs.

13. Nevertheless, on information and belief, there have been recipients of Albert Schweitzer and/or Albert Einstein Chairs who have already attained the age of sixty-five. In addition, on information and belief, the age qualification for Albert Schweitzer and Albert Einstein Chairs is applied on an ad hoc and not a rational basis.

14. As a result, plaintiff has been denied the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution and has been damaged thereby.

Second Cause of Action

15. Plaintiff restates the allegations in each and every allegation in paragraphs 1 through 12 above with the same force and effect.

16. On information and belief, the New York State Legislature did not intend to, and in fact did not, insert a maximum age provision in the legislation creating the Albert Schweitzer and Albert Einstein Chairs but that the policy of selecting people of great distinction would inevitably lead to the selection of scholars of the plaintiff's age and much older.

17. In interjecting an age qualification, the defendants Nyquist and The Regents, and those acting for them, exceeded their statutory authority and plaintiff has been damaged thereby.

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18. Alternatively, on information and belief the interjection of the age limitation was done by an anonymous administrator within the State Department of Education and without the prior approval of the defendant's Nyquist or The Regents. This action was unlawful both in statutory and administrative authority and irregular and plaintiff has been damaged thereby.

Third Cause of Action

19. Plaintiff restates the allegations in paragraphs 1 through 11 above with the same force and effect.

20. On information and belief, Fordham University, through its officers and employees, including the defendants, offered plaintiff an Albert Schweitzer Chair and this offer was accepted.

21. Nevertheless, Fordham University refused, in breach of contract, to grant plaintiff an Albert Schweitzer Chair and plaintiff has been damaged thereby.

WHEREFORE, plaintiff respectfully prays that the Court:

1. Assume jurisdiction of this cause and set this case down promptly for a hearing.

2. Enter a final judgment pursuant to 28 U.S.C. §§2201 and 2202 declaring that the failure of Fordham University to give to plaintiff the Albert Schweitzer Chair offered to him and accepted by him, violates plaintiff's rights under the Fourteenth Amendment to the United States Constitution and under 42 U.S.C. §1983.

3. Enter final judgment pursuant to 28 U.S.C. §§2201 and 2202 declaring that the State Department of Education exceeded its statutory authority when, through the defendants Nyquist and The Regents, or alternatively through an anonymous administrator, it injected an age limitation on the grant of an Albert Schweitzer Chair to plaintiff.

4. Enter a permanent injunction pursuant to Rule 65 of the Federal Rule of Civil Procedure enjoining Defendants, other successors in office, agents, and employees and all other persons in active concert and participation with them from refusing to give

the Albert Schweitzer Chair to plaintiff until he chooses to retire from it.

5. Grant plaintiff one million dollars ($1,000,000) pursuant to Rule 34(d) in compensatory and punitive damages, together with interest and costs of this action.

6. Grant such additional or alternative relief as to the Court may deem just and proper and equitable.

Respectfully submitted

/s/ Jonathan A. Weiss
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FILED
JAN 2 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-737

PAUL WEISS,

Petitioner,

against

REVEREND MICHAEL WALSH, S.J., in his capacity as President of Fordham University; PAUL J. REISS, in his capacity as Vice-President of Academic Affairs of Fordham University; ROBERT ROTH, S.J., in his capacity as Chairman of the Department of Philosophy of Fordham University; EWALD B. NYQUIST, in his capacity as Commissioner of Education of the State of New York; JOSEPH W. MCGOVERN, EVERETT J. PENNY, KENNETH B. CLARK, CARL H. PFORZHEIMER, JR., CHARLES W. MILLARD, JR., JOSEPH C. INDELICATO, EDWARD M. WARBURG, MRS. HELEN B. POWER, JOSEPH T. KING, ALEXANDER J. ALLEN, JR., FRANCIS W. MCGINLEY, MAX J. RUBIN, THEODORE M. BLACK, STEPHEN K. BAILEY, and HAROLD E. NEWCOMB, in their capacities as Regents of the University of the State of New York,

Respondents.

BRIEF IN OPPOSITION

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Respondents.

BRIEF IN OPPOSITION

Opinions Below

The Court of Appeals for the Second Circuit rendered no opinion having affirmed the order of the District Court from the bench. The opinion of the United States District Court for the Southern District of New York is unreported and is annexed to the Appendix on page 23 thereof.

Jurisdiction

Petitioner alleges that jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Question Presented

Whether this Court should exercise its certiorari jurisdiction to review a factual issue where the findings of facts made by the District Court, after a trial of the issues were unanimously affirmed by the Court of Appeals from the bench?

Statement

Petitioner's complaint filed in the District Court below alleged that he was offered the Albert Schweitzer Chair at Fordham University by a former officer of Fordham but that such alleged offer was withdrawn allegedly because of appellant's age with the tacit approval of the State respondents. At the time of the commencement of this action petitioner was sixty-nine years old. Seeking both injunctive and monetary relief under the Civil Rights Act petitioner's complaint asserted that alleged conduct of Fordham and the State defendants violate the First, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 11 of the New York State Constitution in that he was denied employment solely because of his age. Petitioner sought to buttress these alleged claims in his complaint by relying upon New York Education Law sections 239, 296, and 3027; New York Public Authorities Law, Section 2577 and federal policy as expressed in the Older Americans Act of 1965 (42 U.S.C. § 3001 *et seq.*); Executive Order No. 11141 (29 Fed. Reg. 2477 [1964]) and the 1946 Employment Act (15 U.S.C. § 1021).

Respondents thereafter moved for judgment on the pleadings pursuant to Rule 12(c) seeking to dismiss the entire complaint.

By order dated February 24, 1971 the District Court denied petitioner's application for preliminary relief and found that "the denial of a teaching position to a man approaching seventy years of age is not constitutionally infirm" under the Federal or State Constitution. *Weiss* v. *Walsh*, 324 F. Supp. 72, 77 (S.D.N.Y. 1971). However, the Court permitted petitioner to amend his complaint to plead "with greater clarity" a selective enforcement of the age criteria and an exceeding of authority delegated by statute to the Regents with respect to selection standards *id.* at 78. The order invited petitioner as well to press a claim for breach of contract *id.* at 79.

Petitioner then appealed to the Court of Appeals from the denial of his application for a preliminary injunction. In a slip sheet opinion dated October 29, 1971 that Court unanimously affirmed the determination of District Judge Tyler. *Weiss* v. *Walsh*, —— F. 2d —— Docket Nos. 71-1398, 71-1852 (2d Cir. 1971) Slip Sheet Opinion 43, 237, p. 239 (*Lumbard, Mansfield & Oakes*).*

With particular reference to petitioner's claim against the State respondents the Court of Appeals stated:

> "There remains the question of whether Weiss could prove that the decision not to nominate him for the Chair was prompted by discriminatory action on the part of the State of New York or its representatives. Here again the sole evidence proffered is inadequate. Although the correspondence relied upon by Weiss indicates that one reason for not offering

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* The slip sheet opinion was marked with a request to reporting services ("Not to Publish").

You know, we are a country that is forced-fed palpable nonsense of all kinds under the guise of constitutional doctrine. It is no more constitutional doctrine than most I know and very often when it is at least regarded by the Courts as constitutional doctrine it is far from wisdom, do you realize that? Wisdom and the law are not necessarily the same thing.

Here is an instance where wisdom and the law and a 1964 statute in the New York Legislature were pretty close to the same thing.

The motion of the State defendants for dismissal on the merits is granted without any further discussion. There is no evidence direct or indirect of any discrimination express or implied, witting or unwitting on the part of the Board of Regents or the State Commissioner of Education." (Not included in the Appendix but found on pages 652-654 in the record below.)

As noted above, the United States Court of Appeals affirmed the order of the District Court from the bench. The judgment of the Court of Appeals was entered on June 29, 1972 and the petition for rehearing *en banc* was denied on August 29, 1972.

ARGUMENT

Petitioner has presented no valid reasons for this Court to exercise its discretion in granting certiorari.

The record clearly demonstrates that the only claim of any substantive appeal petitioner alleged with respect to the State respondents was one of alleged selective discrimination against petitioner in their refusal to award him a Schweitzer Chair (A.19-A.20). This factual determination, clearly refuted by the State respondents at trial was determined in favor of respondents by the trial judge (A.46-47) and unanimously upheld by the Court of Appeals

in an affirmance from the bench. As this Court stated:

> ". . . this Court . . . rather than a court for correction of errors in factfinding, cannot undertake to review concurrent findings of fact by two Courts below in the absence of a very obvious and exceptional showing of error [which is not the case here]." *Grover Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (cases cited therein) *rehearing denied*, 339 U.S. 605; *Berenzi* v. *Immigration Director*, 385 U.S. 630, 635; *American Federation of Musicians* v. *Carroll*, 391 U.S. 99, 106-107.
>
> See also: *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508, 509.

To be sure the record reflects that the petitioner was not even considered by Fordham University as a possible recipient of the Schweitzer Chair (A.41) and that accordingly the State respondents were not approached for their approval of petitioner.

Since petitioner's alleged constitutional claims rested solely upon the factual setting determined adversely to him it is not necessary to reach these contentions. In any event, as is particularly set forth in an earlier District Court opinion in this litigation, petitioner's constitutional claims are wholly without merit. *Weiss* v. *Walsh*, 324 F. Supp. 75 (S.D.N.Y. 1971) (A.1-A.9).

CONCLUSION

For the foregoing reasons this Court should not exercise its certiorari jurisdiction here where review turns solely upon an analysis of the particular facts involved.

Dated: New York, New York, December 15, 1972.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-737

PAUL WEISS,

Petitioner,

- against -

Reverend MICHAEL WALSH, S.J., in his capacity as President of Fordham University; PAUL J. REISS, in his capacity as Vice-President of Academic Affairs of Fordham University; ROBERT ROTH, S.J., in his capacity as Chairman of the Department of Philosophy of Fordham University; EWALD B. NYQUIST, in his capacity as Commissioner of Education of the State of New York; JOSEPH W. McGOVERN, EVERETT J. PENNY, KENNETH B. CLARK, CARL H. PFORZHEIMER, JR., CHARLES W. MILLARD, JR. JOSEPH C. INDELICATO, EDWARD M. WARBURG, MRS. HELEN B. POWER, JOSEPH T. KING, ALEXANDER J. ALLEN, JR., FRANCIS W. McGINLEY, MAX J. RUBIN, THEODORE M. BLACK, STEPHEN K. BAILEY and HAROLD E. NEWCOMB, in their capacities as Regents of the University of the State of New York,

Respondents.

REPLY BRIEF

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the Chair to him may have been his advanced age, it is equally consistent with defendants' contention that Fordham was merely adhering to its regular retirement policy and regulations in effect since 1947, which established a retirement age of 65 years for all members of its faculty, with employment on a half-time basis thereafter being permitted in exceptional cases at the discretion of the Academic Vice President, but in no event to extend beyond the end of the academic year during which the faculty member might attain the age of 70. Weiss was 69 years of age at the time of the September 1970 correspondence. The letters of Fordham's administrators indicate that since 'The Schweitzer Professor is expected to be appointed in accordance with the University's normal faculty policies' and the State would 'assume that an appointee will hold the Chair for an extended period of years', an appointment of Weiss would constitute such a radical departure from Fordham's own university-wide retirement regulations that the State Education Department would refuse to approve it. If these letters, which represent the only evidence before us, were the sole proof offered by Weiss at trial, it would be a far cry from proving discriminatory action on the State's part."

Petitioner amended his complaint in accordance with the order of the District Court and respondents moved for summary judgment after completion of depositions.

As we shall demonstrate below, absolutely nothing was adduced at trial to substantiate petitioner's claim of discriminatory action on the part of the State.

By order dated January 7, 1972 the District Court denied respondents' summary judgment motion. Specifically with regard to the State respondents the District Court narrowly circumscribed the grounds upon which it permitted peti-

tioner to proceed to trial against them:

> "Evidence presently before the Court also establishes that there are genuine issues of material fact with regard to plaintiff's discrimination claim. It is clear that the State does not have an established rule setting age limits for the Schweitzer Chair, and affidavits submitted by *Amici* counsel at an earlier stage of the litigation indicates that one or two recipients of the Chair may have been appointed after attaining the age of 65 (footnote deleted). The written correspondence in this case raises the possibility that the State acquiesced in Fordham's application of an age limitation to plaintiff which was not applied to all candidates for the Chair . . ." (A.19-A.20)*

Respondent clearly contradicted such claims at trial (*infra*) as the District Court below found.

At the conclusion of the non-jury trial below, the Court granted the State respondents' motion to dismiss from the bench:

> "The State of New York has not done any such thing consciously or unconsciously. What the State of New York has been concerned about and solely concerned about and well enough because the Legislature's mandate is clear, that they are going to see that the eminent men wherever possible get the job to assist the department of a university or other institution of higher learning in a particular field and they are not going to be concerned about age and other matters, they are going to leave that up to the normal rules of the university in question. And for those of us who worry about undue intrusion of the Government into educational affairs, I must say, Mr. Weiss, I applaud the Legislature of the State of New York.

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*Unless otherwise indicated, arabic numerals in parentheses preceded by "a" refer to the appendix to the petition.

I.

This Case Presents the Important Constitutional Question of the Illegality of Age Discrimination Squarely for the First Time.

It is difficult to conceive of a case which could raise the issue of age discrimination more directly than this case of Weiss v. Walsh. One defendant admitted that "this [may] constitute discrimination on the basis of age" (A 62). The decision in Weiss v. Walsh, 234 F. Supp. 75 (1971) ruled directly that age discrimination was constitutionally permissible to dismiss part of the complaint. At trial, there was direct testimony that age was, at least, a basis for rejection and withdrawal of offer (Record below, transcript, pp. 179-81; 305-8) and the Trial Judge so found (A 43).

Yet, respondents attempt to suggest that this constitutional issue is foreclosed by claims of fact-finding at a trial in which age discrimination was

specifically excluded from consideration. (See, e.g., Lefkowitz brief, p. 7.) Such suggestions float away to disappear against the slightest breath of judicial scrutiny.

To begin with, this case is in this Court on an appeal from a dismissal of part of the complaint -- the part that states the cause of action of the unconstitutionality of age discrimination. The ruling of the Court was directly on this issue to dismiss. Weiss v. Walsh, supra. On appeal, of course, the question of whether the part dismissed stated a valid cause of action is the question for the reviewing court. Equally certain is it that the allegations pleaded in the dismissed complaint must be taken as true for the motion and for the appeal. See, e.g., Gardner v. Toilet Goods Association, 387 U.S. 167 (1967). "[A]ccepting, as we must on a motion to dismiss on the pleadings, the allegations of the complaint and supporting affidavit as true" at 42. The facts and allegations of

age discrimination were pled and dismissed on the law — the allegations must be accepted as true and the legal basis advanced for dismissal considered.

Next, it should be noted that respondents Walsh, et al. attempt to cloud the facts by quoting the academic Vice-President as saying that he gave age as a reason to withdraw the offer as a device to "cushion the blow" (p. 7). This same individual had written the State Department of Education about Fordham's "commitment" to Paul Weiss, inquiring if "the man's age would...not be...acceptable" (A 58) and in two letters (A 60-1; A 62-3) and in one telephone conversation told Paul Weiss the Schweitzer Chair was his but for the factor of age, speculating that this might be "discrimination on the basis of age" (A 62). After suit, he claimed those statements were falsehoods, knowingly uttered, while admitting he believed age precluded Paul Weiss' appointment (A 85, 91-4). There is no reason to believe that the post-litigation explanation of falsehoods is

more accurate than pre-trial admissions to Petitioner and other defendants.

In a rather curious path of reasoning, respondents Walsh, et al. attempt yet another suggestion - i.e., because there was an adverse ruling on the issue of selective discrimination "it was first necessary for him to prove that he indeed was the victim of age discrimination" (p. 12). Not so. As the Trial Judge clearly indicated in decisions and throughout trial, the only question presented by that claim (formulated by Judicial direction after dismissal) was one of comparison -- were others of Petitioner's chronological age or older given such posts? (In fact, Fordham claimed to be considering a scholar two years Petitioner's junior, and some recipients of fragments of the Chair were in their 70's. Record transcript, p. 221; A 46). Everytime Petitioner tried to raise the issue of age discrimination, he was specifically told it was not allowed in the case. All the court entertained were the questions of comparative age

for hiring. Petitioner, of course, would have put on his full case of age discrimination with his witnesses, as well as defendants' admission, if allowed. All he was permitted to do, however, was list the ages of others — an act which had nothing to do with proving age discrimination for a cause of action already dismissed. The issue as posed by the Trial Judge, the issue which survived Summary Judgment, was that of special, unequal treatment, in fact, rather than exclusion, rejection, and withdrawal of the offer because of age — that matter had been ruled on, was out of the case, considered irrelevant to this claim, and not allowed proof.

It is rare in discrimination cases that defendants admit they discriminated. Here, they do. It is less rare on an appeal from dismissal of an action to have a clear legal question. Here, too, that clear legal question is presented — and Petitioner respectfully requests this Court to consider that most important question of age discrimination.

II.

Age Discrimination is Wrong and Unconstitutional

Respondents Walsh, et al. argue for age discrimination on the claim of legislative wisdom (pp. 17-19). Assuming such claim of wisdom can effect constitutional rights, it is perhaps appropriate to quote President Richard Nixon's words on the issue in his radio broadcast about H. R. I.:

> "We hear a lot about generation gaps these days. We cannot afford a generation gap which shuts out the young in this country. But neither can we afford a generation gap that shuts out the old.
>
> And so we must develop a new attitude toward aging in America, one that stops regarding older Americans as a burden and starts regarding them as a resource.
>
> Senior power can be a tremendous source of energy for our country. Churchill was a great leader at 81. Holmes was a great jurist at 91. Clara Barton led the Red Cross

> at 83 and Connie Mack led the Athletics at 88. Michelangelo was painting at 89; Toscanini was conducting at 87. And for every celebrated name like these, there are millions of ordinary citizens in their 70's and 80's who are making extraordinary contributions to their communities.
>
> Senator Green of Rhode Island used to contend: 'Most people say that as you get old you have to give up things. I think you get old because you give up things.'
>
> I believe that millions of older Americans can make great contributions to our nation's progress if only they have the chance. This really is the point of our Government programs and policies -- to help older Americans play a full, continuing role in the great adventures of America."

Petitioner agrees with the President and hopes this Court will too.

Respondents Walsh, et al. claim because employment is at stake, there can be no assertion of constitutional rights (pp. 14-15). But, see Petitioner's Petition for Certiorari, pp. 29-30. See also Traux v. Raich, 239 U.S. 33 (1915) "[T]he right to work for a living...is of the very essence of the personal

freedom and opportunity that it was the purpose of the amendment to secure" at 41; see also, Schware v. Board of Bar Examiners, 353 U.S. 232 (1967); Slochower v. Board of Higher Education, 350 U.S. 551 (1950) "[c]onstitutional protection does extend to the public servant whose exclusion [from employment] is patently arbitrary or discriminatory." Wieman v. Updegraff, 344 U.S. 183 (1952) at 192. See, historically, Butchers Union v. Crescent City, 111 U.S. 746 (1884) (concurring opinion of Justice Bradley; Dent v. West Virginia, 129 U.S. 114 (1889), particularly at 121. See in addition to cases cited in Petition for Certiorari, pp. 29-30 and footnote 5 there) for proposition that employment may not be refused or terminated by unconstitutional means or for unconstitutional motives, Cohen v. Chesterfield County School Board, 326 F. Supp. 1159 (1971); Eslinger v. Thomas, 340 F. Supp. 886 (D. S.C. 1972). This defense is defenseless as well as senseless.

Finally, respondent State officials argue they did nothing wrong (see Lefkowitz, e.g., pp. 6-7). But they acquiesced to discrimination and will give money for its use. That is clearly forbidden as wrong by many decisions. See, e.g., Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Derrington v. Plummer, 240 F.2d 922 (5th; 1956) cert. denied 353 U.S. 924 (1957); U.S. v. Price, 383 U.S. 787 (1966); Hammond v. University of Tampa, 344 F.2d 951 (5th; 1965). The State must not allow its funds to be used in a discriminatory manner or they commit an actionable wrong. (It should be noted the Trial Judge prevented any attempt to prove this type of complicity, Record transcript, p. 298).

Petitioner and the issue of age discrimination are before this Court. Past precedent, justice, and common sense require a hearing. Petitioner respectfully requests that hearing.

CONCLUSION

For the reasons set forth above and in the Petition filed herein, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-737

PAUL WEISS,

Petitioner

against

REVEREND MICHAEL WALSH, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order vacating its denial of the petition for writ of certiorari, entered on January 15, 1973, and (2) granting the petition. As grounds for this motion petitioner states the following:

1. THE APPEAL TO THIS COURT OF KINGSTON V. Mc LAUGHLIN, NO. 72-3551-F.

On December 19, 1972, following the denial of certiorari in the instant case, a Three Judge Court convened in the United States district court of Massachusetts denied a motion for the continuance of a temporary restraining order and preliminary injunction and dismissed the action on the merits in Kingston v Mc Laughlin, Civil No. 72 3551 F. An application for a stay of the judgement of the Three Judge District Court was denied by this Court on January 8, 1973,

Kingston v Mc Laughlin No. A665. The plaintiffs in said action have an appeal as of right to this Court pursuant to 28 USC §§ 1253 and attorney for petitioner has been informed by counsel that they intend to file an appeal within the 60 day time limit.

Kingston v Mc Laughlin challenges the constitutionality of an article of amendment to the State Constitution of the Commonwealth of Massachusetts requiring the mandatory retirement of all judges upon reaching the age of seventy, without affording them the hearing available under the State Constitution to those under age seventy.

The instant case brought under the Civil Rights Act involves the exclusion of plaintiff from employment solely on the basis of chronological age. Likewise, a full determination of the Kingston case mandates this Court to examine the issue

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of age discrimination which was raised by the amicus curie brief submitted by Legal Services for the Elderly Poor in the District Court. The contentions in both cases are; the denial of equal protection inherent in the classification of exclusion based on age; the irrationality of age classification in general and the arbitrary choice of age seventy in particular: the denial of due process and equal protection in applying an unwarranted irrebuttable presumption of age infirmity without proof of its application or relevance to the individual; the fundamental constitutional guarantee of the right to work in a chosen profession and the invidiousness of a classification which invades or constrains that right.

The close identity of issues in this case and the Kingston case amply justifies a reconsideration of the denial of certiorari here. It would be appropriate

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for this Court to hear and consider the instant case at the same time it considers the Kingston case so that this Court could explore more fully the scope of age discrimination and its ramifications.

Conclusion

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgement and opinion below.

Respectfully submitted,

February 2, 1973

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for this Court to hear and consider the
instant case at the same time it con-
siders the Kingston case so that this
Court could explore more fully the scope
of age discrimination and its rectification
remedies.

For the reasons set forth above,
as well as those contained in the petition
for writ of certiorari, petitioner prays
that this Court grant rehearing of the
order of denial, vacate that order, grant
the petition and review the judgement and
opinion below.

Respectfully submitted

February 7, 1973

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CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

Jonathan A. Weiss

JONATHAN A. WEISS